Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
1998 Biennial Regulatory Review—Reform of the International Settlements Policy and Associated Filing Requirements	)	IB Docket No. 98-148
Regulation of International Settlement Rates	)	CC Docket No. 90-337

REPLY COMMENTS OF GTE

October 16, 1998

Respectfully submitted,

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ITS AFFILIATED CARRIERS

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GTE Service Corporation and its affiliated carriers ("GTE")[1] hereby submit their replies to the comments in this proceeding.[2]

INTRODUCTION AND SUMMARY

After the initial comments in this proceeding were filed, the Government of Canada entered an order that expressly rejects a policy similar to that of the FCC's international settlements policy ("ISP"), and determined that ISP-type restrictions will apply only to agreements with foreign carriers that have engaged in abusive conduct in

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1 GTE Communications Corporation, GTE Telecom, GTE Hawaiian Tel International and GTE Pacifica. These GTE carriers are affiliated with foreign carriers in the Dominican Republic and Venezuela and the Canadian provinces of British Columbia and Quebec.

2 *1998 Biennial Review-Reform of the International Settlements Policy and Associated Filing Requirements,* IB Docket No. 98-148, *Regulation of International Accounting Rates,* CC Docket 90-337, FCC 98-190, Notice of Proposed Rulemaking (Aug. 8, 1998) ("NPRM").

a destination market.[3] This decision, by a WTO member country and principal trading partner of the United States, underscores GTE's contention that the ISP is not "necessary in the public interest" in the present telecommunications environment and should be eliminated for all settlement agreements between U.S. carriers and carriers in WTO member countries. The Canadian Commission's decision also suggests an approach by which the FCC, if it chooses not to eliminate the ISP outright on WTO routes, might identify those rare circumstances in which continuing ISP restrictions may be appropriate. Specifically, the FCC could adopt an approach similar to that of the Canadian Commission -- and of the FCC itself in its *Foreign Participation Order* -- by creating a presumption in favor of non-application of the ISP that will be overcome only by a demonstration that retention of the ISP on a WTO route is needed to prevent a very high risk to competition in the United States market. Such an approach will fully address the Commission's concern about anticompetitive whipsawing of U.S. carriers without imposing artificial "market power" tests of the kind proposed by AT&T and other commenters. Finally, if the Commission elects to retain a market power test as a means of determining when to apply the ISP on a route, the Commission should find that the test is satisfied by any foreign market in which the principal carrier is required to interconnect, and does interconnect, on a nondiscriminatory basis with one or more competitors in its domestic local exchange market.

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3 Canadian Radio-television and Telecommunications Commission, *Regulatory Regime for the Provision of International Telecommunications Services*, Telecom Decision CRTC 98-17 (Oct. 1, 1998) ("CRTC Order"). The Canadian Commission also has declined to adopt "benchmark" settlement rates. *Id.*

I. The Comments In This Proceeding And The Decision Of The Canadian Commission Demonstrate That The ISP Should Be Eliminated On All WTO Routes

In its comments in this proceeding, GTE agreed with the Commission's observation that the international settlements policy ("ISP") may have significant anticompetitive effects in the present international telecommunications marketplace.[4] GTE disagreed, however, with the Commission's conclusion that those anticompetitive effects are outweighed by the ISP's supposed value as a means of preventing "whipsawing" of U.S. carriers by dominant foreign carriers in destination markets.[5] As GTE pointed out, the explosive growth of arbitrage services and bypass technologies has deprived foreign carriers of the ability to whipsaw their U.S. correspondents.[6] And in WTO countries, in particular, the market-opening commitments of the Basic Telecom Agreement and the GATS obligations of Most Favored Nation and National Treatment reduce the risk of whipsawing still further and give the United States effective trade dispute remedies against abusive conduct by foreign correspondents.[7] Under these circumstances, the anticompetitive effects of the ISP are not offset, on WTO routes, by any public interest benefits that that policy might have offered in the telecommunications environment of previous decades. Pursuant to the congressional mandate to eliminate all regulations that are no longer "necessary in the public interest," therefore, the ISP

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4 Comments of GTE at 4-5, citing NPRM ¶¶ 9-12.

5 *Id.* ¶¶ 6-8.

6 Comments of GTE at 7-8.

7 GTE Comments at 7 n. 16; *see also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket No. 97-142, FCC No. 97-195, Order and Notice of Proposed Rule Making (June 4, 1997) at ¶ 35 ("*Foreign Participation NPRM*").

must be eliminated for all agreements between U.S. carriers and foreign carriers in WTO countries.[8]

Both the comments in this proceeding and events since GTE's comments were filed reinforce GTE's proposal. Most importantly, in an order entered on October 1, 1998, Canada, a WTO member nation and the most important trading partner of the United States, rejected ISP-type obligations as an anticompetitive anachronism and announced that Canada will apply those requirements only upon a showing of abusive conduct by a correspondent carrier in a destination market.[9] Specifically, the Canadian Radio-television and Telecommunications Commission ("CRTC") considered whether it should require "proportionate return, parallel accounting or the equal division of accounting rates" in the absence of "evidence of some kind of conduct that is having an anti-competitive effect in the Canadian market."[10] The CRTC found that such policies would impede, rather than promote, competition. Notably, the CRTC found that proportionate return requirements would "provide Teleglobe with an undue advantage at the outset of competition" and impede competition for the termination of inbound traffic.[11] Similarly, the CRTC concluded that a requirement of parallel (*i.e.*, uniform) accounting rates would discourage international carriers from "reduc[ing] the accounting rate granted to one Canadian service provider if that means it must automatically reduce the accounting rate for all other Canadian service providers."[12] Based on these concerns, which are the same competitive difficulties this Commission has identified as

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8 47 U.S.C. § 161(b).

9 CRTC Order.

10 *Id.* at 32

11 *Id.*

12 *Id.*

presented by the ISP rules,[13] the CRTC decided not to impose ISP-type requirements unless a showing is first made that a foreign correspondent carrier has harmed competition in the Canadian market.[14]

Canada's analysis of the international marketplace is echoed by the comments in this proceeding of Competitive Telecommunications Association ("Comptel") and ntt.com.inc., which point out that bypass technologies and the market-opening commitments of the WTO have eliminated the usefulness of the ISP. Comptel, like GTE, points out in its comments that the "explosion in third country routing services" in the past 18 months raises the question "whether any carrier -- even a dominant carrier which does not face facilities-based competitors -- has the ability to whipsaw or otherwise discriminate against U.S. carriers," and accordingly questions the need for ISP restrictions on any WTO route.[15] Similarly, ntta.com.inc. points out that whipsawing by a carrier in a WTO country would violate GATS principles and urges the Commission to "apply the ISP and related restrictions to carriers from WTO countries *only* if the Commission has found them to be engaged in anti-competitive practices that harm U.S. consumers."[16]

By contrast, those comments that urge the Commission to retain the ISP tend to ignore the proliferation of bypass technologies and downplay the significance of the WTO Basic Telecom Agreement. AT&T, for example, argues that whipsawing is still a viable threat but does not address the impact of reorigination, callback or Internet telephony on the feasibility of whipsawing strategies. AT&T also argues that the WTO

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13 NPRM at ¶¶ 9-12.

14 CRTC Order at 31.

15 Competitive Telecommunications Association Comments at 7.

16 Comments of ntaa.com.inc, at 7.

Basic Telecom Agreement is of negligible importance because "only 28 [WTO] countries . . . committed to competition on January 1, 1998 under the WTO Agreement."[17] As this Commission pointed out in its Notice of Proposed Rule Making in the *Foreign Participation* proceeding, however, the WTO countries that have made market-opening commitments represent all but 3 percent of the total basic telecommunications service revenues for WTO member countries.[18] Under these circumstances, whipsawing by carriers from WTO member countries is an improbable strategy that cannot justify retention of the ISP on WTO routes.

II. In The Alternative, The Commission Should Apply The Test Adopted In The Canadian Order And The FCC's *Foreign Participation Order* To Agreements Between U.S. Carriers And Correspondents In WTO Member Countries

In the *Foreign Carrier Entry* proceeding, the Commission correctly found that all WTO member countries, including those that have not made substantial market-opening commitments, are subject to GATS principles that justify removal of the effective competitive opportunities ("ECO") test for §214 applications from carriers affiliated with carriers from WTO countries. Accordingly, under the test adopted in the *Foreign Carrier Entry Order*, applications from carriers affiliated with carriers from WTO member countries are presumed to be pro-competitive. The presumption may be overcome only by an affirmative demonstration that granting the application would pose "a very high risk to competition in the U.S. market."[19]

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17 AT&T Comments at 6 n. 7.

18 *Foreign Participation NPRM* ¶ 35. As the Commission also pointed out, "it is reasonable to expect that [these WTO members that have not made market-opening commitments] will make market access commitments for basic telecommunications services." *Id.* ¶ 36.

19 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, FCC No. 97-398, Report and Order and Order on Reconsideration (Nov. 26, 1997) ("*Foreign Carrier Entry Order*") at § 51.

There is no rational basis for eliminating the ECO test in the context of market entry and retaining a variant of that test in determining whether to apply the ISP. The risk of whipsawing on a WTO route is certainly no greater -- and in fact is substantially less -- than the risk that a foreign affiliate of a U.S. carrier will favor its affiliate in the terms of interconnection in the destination country. Accordingly, if the Commission does not eliminate the ISP altogether on WTO routes, it should at least adopt a presumption in favor of non-application of the ISP on those routes, to be overcome only upon an affirmative showing that application of the ISP is needed to prevent a "very high risk to competition in the U.S. market."[20] Also, the "very high risk to competition" test should not be based on a market-share threshold or other artificial measure. Instead, a party seeking to overcome the presumption should be required to demonstrate that the correspondent carrier has the actual ability to "whipsaw" U.S. carriers, based on the totality of competitive circumstances on the route.[21]

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20 *Id.*

21 As noted earlier, adoption of the proposed presumption also is consistent with the approach of the Canadian Commission, which has eliminated the ISP on all routes except where there is evidence of practices that "are having an anti-competitive effect in the Canadian market." CRTC Order at 31. In fact, the approach proposed by GTE is less radical in two respects than that of the Canadian Commission. First, Canada presumptively declines to impose the ISP on any route, including routes between Canada and non-WTO countries. Second, Canada will not apply ISP-type restrictions unless it has proof, not only that the ISP is needed to prevent a risk of harm to competition, but that such harm actually has occurred. GTE's proposal does not ask the Commission to eliminate the ISP on non-WTO routes or to demand proof that competitive harm already has occurred before retaining the ISP where eliminating that policy poses a very high risk to competition. In fact, GTE's proposal does not go beyond the approach the Commission already has adopted in the *Foreign Participation Order,* and would do no more than make the Commission's ISP policy consistent with its foreign carrier entry policy.

III. If The Commission Elects To Impose A Market Power Test, It Should Require Only That Correspondent Carriers Interconnect On Nondiscriminatory Terms With Their Competitors In The Destination Market

If the Commission still elects to apply the ISP to carriers found to be "dominant" in WTO markets, the Commission should adopt a test for dominance that is simple, manageable and does not declare foreign carriers dominant when those carriers have no ability to harm competition in the U.S. market. Under these criteria, both the standard proposed in the NPRM and the tests suggested by AT&T and other commenters should not be adopted.

As GTE pointed out in its comments, the Commission's proposal to retain the ISP for agreements with foreign carriers that have a domestic market share of 50 percent or more in a WTO member country has no public-interest basis. A foreign carrier with 50 percent or more of its domestic market cannot whipsaw U.S. carriers so long as bypass technologies are available; and a foreign carrier in a WTO country is doubly constrained from whipsawing behavior by the market-opening requirements of the Basic Telecom Agreement and the GATS requirements of Most Favored Nation and National Treatment. Accordingly, adoption of the "50 percent market share" test for a dominant carrier on a WTO route is not needed to protect competition.

The dominance tests proposed by other commenters -- particularly AT&T -- also are unnecessary and anticompetitive and should not be adopted. AT&T, for example, proposes that the ISP be retained for agreements with all foreign carriers, except where notice -and-comment proceedings have established, on a route-by-route basis, that particular foreign carriers are nondominant in their home markets.[22] When this process results in a finding that a foreign carrier is "dominant," AT&T suggests that the ISP be removed for agreements with that carrier only after "the dominant carrier [has] lowered

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22 AT&T Comments at 5.

settlement rates to 'best practice' levels, or . . . U.S. carriers have the ability to terminate traffic in the foreign market through viable ISR arrangements . . . "[23] This cumbersome process, which will involve the FCC in an undetermined number of contentious notice-and comment proceedings unguided by any clear rule of decision, will result in a more regulated and less competitive international telecommunications market.[24]

Similarly, other commenters have proposed variants of the "market share" test for determining when the ISP should be imposed. For example, Level 3 Communications suggests that the ISP be retained for all agreements that affect more than 10 percent of traffic on a route,[25] and the Telecommunications Resellers Association proposes that the Commission presume market power for any carrier with a market share of 25 percent or more.[26] These proposals, although not as cumbersome procedurally as the AT&T recommendation, would retain the ISP in cases in which the ISP is not needed to prevent whipsawing and will discourage competition.

If the Commission still elects to apply the ISP to carriers found to be "dominant" in WTO markets, the Commission should not adopt any of the proposed, artificial tests based upon market share or the percentage of traffic on a route handled by the foreign carrier. Instead, the Commission should find that a foreign correspondent carrier is

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23 *Id.* at 2-4.

24 In fact, AT&T is urging the Commission to engage in an in-depth review of the progress of WTO countries' implementation of their market-opening commitments under the Basic Telecom Agreement. This is precisely the sort of cumbersome inquiry that the Commission sought to avoid, in the market entry context, when it abandoned the ECO test. *Foreign Participation Order* at ¶¶ 9, 29. Such an inquiry, as a predicate for regulatory action that affects different WTO countries differently is contrary to GATS principles.

25 Level 3 Communications, LLC Comments at 2.

26 Comments of Telecommunications Resellers Association at 4.

nondominant if it is required to interconnect, and in fact does interconnect on nondiscriminatory terms, with competitors in that market. Regardless of its market share, a foreign carrier that interconnects with its domestic competitors cannot whipsaw its U.S. correspondents. Faced with such a whipsawing strategy, those correspondents simply can negotiate a better agreement with competing carriers and reach the larger carrier's customers through interconnection. Even if the principal carrier in a foreign market has a market share of well over 50 percent, it will be forced to lower its settlement rates in response to competition from a competitor with which its facilities are interconnected.

IV. The Commission Should Eliminate The International Filing Requirements Of The Flexibility Rules Wherever The ISP Is Eliminated

AT&T correctly states that the Commission's proposal to modify the flexibility policy by allowing carriers to seek authorization for below 25 percent alternative settlement arrangements without disclosing the terms and conditions of the agreement or identifying the foreign correspondent is anticompetitive.[27] As AT&T points out, this rule ensures that some U.S. carriers "will be required to disclose the terms and conditions of [their] arrangements with dominant carriers in multi-carrier WTO markets" while other U.S. carriers "are allowed to make secret arrangements for all their traffic to these markets."[28] The solution, however, is not to retain the present filing requirements for all flexible arrangements. The solution, as GTE proposed in its comments, is to eliminate the ISP, and therefore the present flexibility and filing

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27 AT&T Comments at 16; NPRM ¶ 33.

28 *Id.*

requirements, for agreements with all carriers from WTO countries -- not just that pass a competitive test applied on a route-by-route basis.[29]

V. ISR Should Be Permitted On All WTO Routes

AT&T and Sprint suggest that the Commission's present restrictions on ISR are needed to deal with residual, one-way bypass practices or WTO routes.[30] In fact, the Commission already has determined that "the WTO agreement substantially reduces the threat of one-way bypass,"[31] and many of the most important trading partners of the United States, including Japan, impose no restrictions on ISR.[32] The United States can deal with one-way bypass through trade dispute procedures already provided for in the WTO; accordingly, there is no reason for the United States to continue to lag behind other WTO nations in liberalizing ISR requirements.

Conclusion

In the ongoing process of deregulation of international telecommunications, there is no reason for the FCC to relinquish its historic leadership to other WTO countries. The enlightened approach that the Commission has taken to foreign carrier entry applies equally to the application of ISP restrictions to settlement agreements between U.S. carriers and correspondent carriers from WTO countries. The Commission therefore should decline to apply the ISP to settlement agreements on any WTO route unless application of ISP restrictions is required to prevent a very high risk of harm of competition in the U.S. market. In the absence of such a demonstration, the

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29 GTE Comments at 11-12.

30 AT&T Comments at 28-33; Sprint Corporation Comments at 2.

31 *Foreign Participation NPRM* at ¶ 50.

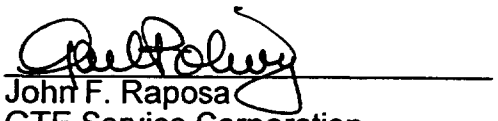
32 NPRM at ¶ 37.

Commission must eliminate ISP restrictions as no longer necessary in the public interest.

October 16, 1998

Respectfully submitted,

GTE SERVICE CORPORATION AND
ITS AFFILIATED CARRIERS

By: 

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments of GTE" have been mailed by first class United States mail, postage prepaid, on October 16, 1998 to all parties on the attached list.

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